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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AARON STRAND, KARL L. LINCK, JUDY FISCHER,
THOMAS J. SPAETH, AND JERRY D. KOLBE

Appeal 2007-3766
Application 09/774,275
Technology Center 3700

Decided: April 11, 2008

Before TERRY J. OWENS, MURRIEL E. CRAWFORD, and JENNIFER D.
BAHR, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants appeal from a rejection of claims 75-78, 81-98, 101-116, 138-143 and 145-153. Claims 79, 80, 99, 100 and 144, which are all of the other pending claims, stand withdrawn from consideration by the Examiner.

THE INVENTION

The Appellants claim a reclosable bag. Claim 75 is illustrative:

75. A reclosable bag for filling with at least one food product, said reclosable bag comprising:

at least one sheet of web material comprising at least one fold located therein, two areas of structural weakness on opposite sides of said fold, and an opening located directly opposite said fold, and

a reclosable fastener structure comprising two releasably engageable tracks each having a skirt structure of skirt web material extending therefrom, said fold being located in said reclosable fastener structure intermediate said skirt structures;

said skirt structures each including a distal margin;

said distal margins of said skirt structures being coupled to said web material at corresponding opposed locations respectively located between said areas of structural weakness and said opening;

said reclosable fastener structure extending past said fold and said areas of structural weakness;

said reclosable bag capable of being filled with at least one food product through said opening.

THE REFERENCES

Lingenfelter	US 3,181,583	May 4, 1965
Peppiatt	US 5,221,143	Jun. 22, 1993
Plourde	US 5,875,611	Mar. 2, 1999

THE REJECTIONS

The claims stand rejected under 35 U.S.C. § 103 as follows: claims 75-78, 81-90, 96-98, 101-110, 116, 138-143, 145, 147 and 150-153 over Lingenfelter in view of Plourde; claims 91, 92, 111, 112, 148 and 149 over Lingenfelter in view of Plourde and admitted prior art; and claims 93-95, 113-115 and 146 over Lingenfelter in view of Plourde and Peppiatt. Claims 86-88 and 106-108 also stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement.

OPINION

We affirm the rejections under 35 U.S.C. § 103 and reverse the rejection under 35 U.S.C. § 112, first paragraph.

Rejection under 35 U.S.C. § 103 of claims 75-78, 81-90,
96-98, 101-110, 116, 138-143, 145, 147 and 150-153
over Lingenfelter in view of Plourde

The Appellants argue only the independent claims, i.e., claims 75, 96, 116 and 138, and the Appellants rely upon the same arguments regarding each of those claims (Br. 14-42). We therefore limit our discussion to one of those claims, i.e.,

claim 75. Our reasoning regarding that claim applies to claims 96, 116 and 138. Also, because the claims which depend from the independent claims are not separately argued, the dependent claims stand or fall with the independent claim from which they depend. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2007).

Lingenfelter discloses plastic bag 10 comprising flexible closure strips 14 and 16 and, between them, a rib-and-groove fastener (18, 20, 28, 30) (col. 2, ll. 2-15). Flexible closure strips 14 and 16 are heat sealed to opposite sides of plastic bag 10 (col. 2, ll. 15-17). In one embodiment plastic bag 10 is formed from a single continuous thermoplastic sheet that is folded at its top upon itself to provide two face-to-face panels (19, 21) that are heat sealed together along opposite edges to form the two side edges of plastic bag 10 (col. 2, ll. 17-22; fig. 3). Along the fold is rupturable tearline 32 (col. 2, ll. 22-23). To gain access to the contents of plastic bag 10, flexible closure strips 14 and 16 are pulled outwardly to disengage the rib-and-groove fastener and rupture tearline 32 (col. 2, ll. 32-39).

Plourde discloses plastic bag 50 comprising tube sheet material 10, the outer surfaces of which are attached at offset seals 46 and 48 to zipper tape 20 (col. 1, ll. 12-16; col. 4, ll. 21-33). Tube sheet material 10 has, between zipper tape 20 and offset seals 46 and 48, an end perforated longitudinally with two spaced-apart perforations 40 that may be broken to gain access to the interior of bag 50 (col. 3, ll. 66-67; col. 4, ll. 51-53).

The Examiner argues that it would have been obvious to one of ordinary skill in the art to replace Lingenfelter's single rupturable tearline 32 with Plourde's

two spaced-apart perforations 40 to increase the size of the bag's opening by the amount of bag material removed between Plourde's spaced-apart perforations 40 (Ans. 9).

The Appellants argue (Br. 19-20):

Appellants disagree inasmuch as the width of the opening (as distinguished from the length of the opening, which runs from one side of the bag to the other) would not necessarily be any larger. In fact, when the bag taught by the Lingenfelter reference is opened by tearing along the tearline 32, the resulting opening will likely be as wide as the widths between the panels 19 and 21, since there is relatively little material in the fold itself. In contrast, in the bag taught by the Plourde '611 reference after the material between the perforations 40 is removed (as best shown in Fig. 4), the remaining portions of the sheet material 10 will likely flop toward each other, thereby actually narrowing the width of the opening.

The Appellants' argument that the remaining portions of Plourde's sheet material likely will flop together and thereby narrow the width of the opening is unconvincing because it is merely speculation by the Appellants' counsel, and unsupported attorney argument cannot take the place of evidence. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984). The Appellants have not explained, and it is not apparent, why bag material on each side of a cutout would be more likely to flop together than bag material on each side of a slit.

Moreover, regardless of whether Plourde's two spaced-apart perforations 40 provide a wider bag opening than Lingenfelter's tearline 32, one of ordinary skill

in the art would have appreciated that both Lingenfelter's tearline 32 and Plourde's two spaced-apart perforations 40 are effective alternatives for providing an opening in a plastic zipper-lock bag. For that reason alone it would have been prima facie obvious to one of ordinary skill in the art to use Plourde's two spaced-apart perforations 40 in Lingenfelter's bag. See *KSR Int'l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007), "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill."

The Appellants argue that the top of Plourde's tube sheet material 10 is an arc, not a fold (Br. 23-24).

That argument is not convincing because Lingenfelter discloses the fold relied upon by the Examiner (Ans. 11-12).

The Appellants argue that substituting the top portion of Plourde's bag for that of Lingenfelter would destroy the operation of Plourde's tube sheet material 10 because Plourde's bag must be filled from the side (Br. 24-25).

It is Lingenfelter's bag, not Plourde's bag, that is being modified by the Examiner. Substituting Plourde's two spaced-apart perforations for Lingenfelter's single rupturable tearline would have been prima facie obvious to one of ordinary skill in the art for the reasons given above.

The Appellants argue (Br. 25-26):

In the Lingenfelter reference, the intermediate portions of the closure strips 14 and 16 are attached to the panels 19

and 21, respectively, of the bag 10. The distal portions of the closure strips 14 and 16 are quite clearly adjacent but not coupled to the panels 19 and 21 of the bag 10. In the Plourde '611 reference, the offset seal 48 is quite clearly not located at the distal portion of the segment of the hood supporting the male zipper profile 24.

The meanings of “margin” include “the outside limit and adjoining surface of something: EDGE <at the ~ or the woods>”.¹ Thus, considering Lingenfelter’s flexible closure strips 14 and 16 to correspond to the Appellants’ skirt structures, both the lower edges of Lingenfelter’s flexible closure strips 14 and 16 in figure 3 and the adjacent seals between those strips and, respectively, panels 19 and 21, are within Lingenfelter’s skirt structure distal margins. Furthermore, one of ordinary skill in the art would have appreciated that a wider fold region would be desirable to accommodate Plourde’s two spaced-apart perforations 40 and, therefore, would have been led by the references to position Lingenfelter’s distal margin seals either more toward or at the lower edges of flexible closure strips 14 and 16 in figure 3 to provide the additional fold region material.

For the above reasons we are not convinced of reversible error in the rejection under 35 U.S.C. § 103 of claims 75-78, 81-90, 96-98, 101-110, 116, 138-143, 145, 147 and 150-153.

Rejections under 35 U.S.C. § 103 of claims 91, 92, 111, 112, 148 and 149 over Lingenfelter in view of Plourde and admitted prior art, and claims 93-95, 113-115 and 146

¹ *Webster’s New Collegiate Dictionary* 702 (G. & C. Merriam 1973).

over Lingenfelter in view of Plourde and Peppiatt

The Appellants do not separately argue the rejections under 35 U.S.C. § 103 of dependent claims 91, 92, 111, 112, 148 and 149 over Lingenfelter in view of Plourde and admitted prior art, and dependent claims 93-95, 113-115 and 146 over Lingenfelter in view of Plourde and Peppiatt (Br. 14). For the reasons given above regarding the independent claims, we are not persuaded of reversible error in those rejections.

Rejection of claims 86-88 and 106-108 under
35 U.S.C. § 112, first paragraph, as failing
to comply with the enablement requirement

A specification complies with the 35 U.S.C. § 112, first paragraph, enablement requirement if it allows those of ordinary skill in the art to make and use the claimed invention without undue experimentation. *See In re Wright*, 999 F.2d 1557, 1561 (Fed. Cir. 1993).

The Examiner argues that “[t]he specification fails to provide an adequate written description of the areas of structural weakness nonlinearly extending across a width dimension or a length dimension” (Ans. 4).²

² The Examiner’s argument appears to be directed toward the 35 U.S.C. § 112, first paragraph, written description requirement rather than the enablement requirement. A specification complies with the 35 U.S.C. § 112, first paragraph, written description requirement if it conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, the inventor was in possession of the invention. *See Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). The Examiner has not explained why the Appellants’ disclosure would

The Appellants argue that those areas of structural weakness are shown in figure 5, and the Appellants refer to the related description in the Specification, which is (Spec. 20:1-3): “This embodiment includes score lines 12 laid out in an alternative pattern that includes curve or arcuate section 13 and tear notch 24” (Reply Br. 3). The Appellants argue: “Thus, the score lines 12 are nonlinear in that they include the curve or arcuate sections 13 at each end thereof.” *See id.*

The Examiner has not explained why, in view of the disclosure pointed out by the Appellants, one of ordinary skill in the art would not have been able to make and use the claimed invention without undue experimentation.

The Examiner, therefore, has not established a prima facie case of failure to comply with the 35 U.S.C. § 112, first paragraph, enablement requirement.

DECISION

The rejections under 35 U.S.C. § 103 of claims 75-78, 81-90, 96-98, 101-110, 116, 138-143, 145, 147 and 150-153 over Lingenfelter in view of Plourde, claims 91, 92, 111, 112, 148 and 149 over Lingenfelter in view of Plourde and admitted prior art, and claims 93-95, 113-115 and 146 over Lingenfelter in view of Plourde and Peppiatt are affirmed. The rejection of claims 86-88 and 106-108 under 35 U.S.C. § 112, first paragraph, enablement requirement, is reversed.

have failed to convey with reasonable clarity to those skilled in the art that, as of the filing date sought, the Appellants were in possession of the invention.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

jlb

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